No. 92-254

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAY B. BRIGHT,

Petitioner,

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY; RUTGERS COUNCIL OF AAUP CHAPTERS; THE FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE; IMMIGRATION AND NATURALIZATION SERVICE U.S. DEPARTMENT OF JUSTICE; and NEW JERSEY DIVISION OF STATE POLICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, IN OPPOSITION

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September 9, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3288

QUESTION PRESENTED

Whether, in affirming the District Court's grant of summary judgment in favor of Rutgers, The State University of New Jersey and its dismissal of the complaint on the grounds that the claims under 42 U.S.C. §§1981, 1983, 1985(2), and 1986 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* were untimely, the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or . . . sanctioned such a departure by [the District Court] . . . as to call for an exercise of the Supreme Court's power of supervision" pursuant to Supreme Court Rule 10.1(a) where the decisions below do not conflict with decisions of other courts of appeals or of this Court?

PARTIES BELOW

The only parties to this proceeding in the courts below were those indicated in the caption of this brief.

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OPINIONS BELOW

The Court of Appeals affirmed the decision of the District Court without opinion. 961 F.2d 207 (3d Cir. 1992) (Appendix W, p. 124a)* The opinion of the District Court (Appendix Q, p. 101a) was not reported.

*All references in this Brief to the Appendix are to the Appendix submitted by Respondent Rutgers, The State University of New Jersey.

JURISDICTION

Petitioner seeks to invoke the certiorari jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, the relevant text of which is contained in Appendix Z:

42 U.S.C. §1981
42 U.S.C. §1983
42 U.S.C. §1985(3)
42 U.S.C. §1986
42 U.S.C. §1988
42 U.S.C. §2000e-2(a)
42 U.S.C. §2000e-3(a)
42 U.S.C. §2000e-5(e)
N.J.S.A. 2A:14-2

COUNTER-STATEMENT OF THE CASE

A. Procedural History

Petitioner, a former Assistant Professor at Rutgers, The State University of New Jersey (hereafter, "Rutgers" or the "University"), filed the complaint in this case on September 21, 1988. (Appendix A, pp. 1a-9a) Although it contains a variety of factual allegations and makes some reference to various legal claims, the complaint does not clearly set forth any connection between the facts alleged and the legal claims advanced.

Nevertheless, the factual allegations of the complaint may be broken down into two categories. First, petitioner apparently contends that the University improperly discriminated against him at the time of his hire due to his race and national origin in that (1) his academic rank of Assistant Professor was an inappropriate "entry level"

position; (2) his starting salary of $30,140 per year was $8,000 to $10,000 below any other Ph.D. in his department; and (3) his office assignment was on a floor with a "group of non-Ph.D.'s," apart from the main departmental offices. (Appendix A, p. 3a)

The second category of petitioner's factual allegations involve numerous fantastic assertions of a complex "conspiracy and campaign to malign, defame and discredit [plaintiff] and a conspiracy to abridge his civil rights." (Appendix A, pp. 4a-7a). The complaint averred that Rutgers conspired and colluded with, among others, co-defendant Rutgers Council of AAUP Chapters (the Rutgers faculty union, hereafter the "AAUP"), the Federal Bureau of Investigation, the Immigration and Naturalization Service and the New Jersey Division of State Police.[1] In his answers to the University's interrogatories, petitioner has asserted that the conspiracy involves "prospective employers, local businesses, local social organizations, New Jersey Govt. agencies, United States Govt. agencies, University administrators, staff, students, Indo-Americans, the media, elected representatives at the local, state and Federal level, among others."

Although unclear, the complaint appears to assert a cause of action against Rutgers under 42 U.S.C. §1981 and §1983 for alleged employment discrimination (presumably, the §1983 claim is based on the Equal Protection Clause of the Fourteenth Amendment); a cause of action under 42 U.S.C. §§1985(2) and 1986 for alleged conspiracy to violate his civil rights; a cause of action for unlawful employment discrimination in

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[1] By Orders dated March 14, 1989 and March 31, 1989, the claims against the FBI, INS and the State Police were dismissed.

violation of 42 U.S.C. §2000e-2(a)(1) and (2); and a cause of action for retaliation in violation of 42 U.S.C. §2000e-3.

After certain discovery was completed[2] and following numerous applications, petitions, motions, "urgent petitions," and "alerts" filed by petitioner, the University moved for summary judgment (Appendix K, pp. 44a-45a) on the grounds that (1) petitioner's claims under 42 U.S.C. §§1981, 1983, 1985 and 1986 were barred by the applicable statute of limitations; (2) petitioner's claims under 42 U.S.C. §2000e *et seq.* were barred due to plaintiff's failure to file a timely charge of discrimination with the EEOC; and (3) even if petitioner's claims were not time-barred, the allegations of the complaint either failed to state a claim or the University was entitled to summary judgment on the merits.[3]

The District Court held that the petitioner's claims were barred by the applicable statutes of limitations and consequently saw no need to address the University's other arguments (Appendix Q, p. 110a)[4] The District Court

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[2]Petitioner and the University answered the other's interrogatories, the University produced voluminous documents, and the University took plaintiff's deposition.

[3]The University relied on supporting affidavits from Dr. Walter Gordon. Provost of Rutgers' Camden Campus and formerly Dean of the Faculty of Business Studies at the Camden Campus (Appendix M) and Dr. Peter Weissenberg, formerly Associate Dean of the Faculty of Business Studies at Rutgers Camden Campus (Appendix L); transcript excerpts from petitioner's deposition (Appendices N, O); and petitioner's answers to interrogatories.

[4]The District Court entered an Order dismissing the case as to Rutgers (Appendix R, p. 111a) simultaneously with the issuance of its written opinion. Subsequently, the District Court denied petitioner's motion for reconsideration and his motion for reconsideration of the District Court's denial of his motion for reconsideration. (Appendices S, T, U, pp. 112a-119a)

also found no merit in petitioner's application for additional discovery and for a continuance (Appendix P) for that purpose. The Court noted that the University had responded to petitioner's discovery requests; that petitioner's application for additional discovery did not suggest what might be disclosed by further discovery, what facts petitioner was seeking, or how they would overcome the summary judgment motion; and that petitioner's application for a continuance and further opportunity for discovery was based only on broad conclusory allegations. (Appendix Q, pp. 104a-105a)

While the case was pending in the District Court, petitioner filed numerous applications, "urgent petitions," and "alerts." Among other things, petitioner sought to have the District Judge recuse himself; suggested that the District Judge was part of Jewish conspiracy; sought proto harm him and his family[5]; and sought the appointment of a special prosecutor to investigate these and other accusations. (Appendices B, D, E, F) The District Court, for the most part, issued written opinions on petitioner's applications no matter how bizarre or farfetched they appeared. (*E.g.*, Appendices C, G, J)

On appeal, petitioner again peppered the court and the parties with an abundance of "urgent petitions," "alerts," motions, and applications. (Appendix V, pp. 120a-121a) The Court of Appeals affirmed the District Court, without opinion (Appendix W, p. 124a), and denied petitioner's petition for rehearing and rehearing *en banc.* (Appendix X, p. 125a)

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[5]Petitioner filed papers asserting that various government agents tailed him, attempted to run him off the road, and used gas and chemical weapons against him. (Appendix F, pp. 23a-25a)

B. Facts

1. Petitioner's Background Prior to 1984.

Petitioner was born and educated in India and ultimately received a B.Sc. degree in 1954 from Gujarat University. (Appendix N, pp. 63a-65a). In 1958, petitioner came to the United States to attend Heald College of Engineering in San Francisco. He studied at Heald College for one academic year and left without earning a degree. (Appendix N, pp. 65a-67a)

Sometime later, petitioner attended the University of Houston where he received his Masters Degree in August 1962. (Appendix N, pp. 67a-68a) Petitioner returned to the University of Houston in early 1966 as a graduate student in the College of Business where he studied economics and management. Petitioner earned his doctorate from the University of Houston in August 1969. (Appendix N, p. 71a)

In September 1969 Petitioner joined the faculty at the Columbus College campus in the University of Georgia system as an assistant professor. (Appendix N, p. 72a) Petitioner was employed by Columbus College for approximately five years, never advancing beyond assistant professor and never earning in excess of $15,000 per year. (Appendix N, p. 77a-78a)

Petitioner left Columbus College under circumstances that were similar to those in the present matter. Petitioner says that he had been promised a promotion and raise

by the Dean at Columbus College. When the promotion was not forthcoming, petitioner filed charges with the EEOC, claiming that the failure to promote him was due to illegal discrimination. (Appendix N, pp. 78a-79a) Though his contract was renewed after the filing of charges, it was not renewed for the 1974-75 academic year. (Appendix N, pp. 79a-81a)

Petitioner then sent out hundreds of resumes but received only one job interview, at Alabama State College in Montgomery, Alabama where he was hired. (Appendix N, p. 81a) Petitioner taught at Alabama State until September 1975, at which time his contract was not renewed. (Appendix O, p. 83a) Again, petitioner filed discrimination charges against his employer with the EEOC. Petitioner claimed that he was discriminated against due to his foreign birth, which discrimination manifested itself in an *inappropriate office assignment and the hiring of two white "non-Ph.D.'s" at a higher salary*. The EEOC found no basis for these charges. (Appendix O, pp. 83a-85a)

After his non-renewal by Alabama State, petitioner was unemployed for nearly two years. (Appendix O, p. 86a) Thereafter, petitioner got a job in his native India where he was employed for less than one year (Appendix O, p. 86a), returned to the United States in 1977 and found a part time faculty position at California State University (Appendix O, p. 87a), and then returned to India in early 1978. (Appendix O, p. 87a)

After three or four months in India, petitioner returned to the United States, moving to Boston. (Appendix O, p. 87a) Believeing that he was the victim of blacklisting by the United States government, petitioner chose Boston so that he could enlist Senator Edward Kennedy

"to correct the injustices to which [he] was being subjected." (Appendix O, pp. 87a-88a) Eventually, after sending "hundreds" of resumes to colleges, universities, and private industry (Appendix O, p. 88a), petitioner secured a position as an associate professor of management at American International College in Springfield, Massachusetts where he was employed for two years, with a starting salary of approximately $16,000. (Appendix O, pp. 88a-89a) Petitioner left American International College in August 1980 when his contract was not renewed. (Appendix O, p. 89a)

After leaving American International College, petitioner secured a position at Gannon University in Erie, Pennsylvania where he was hired as an associate professor with a starting salary of $19,000 beginning in the fall of 1980. (Appendix O, pp. 90a-92a)

Petitioner testified that he was promised a full professorship at Gannon and was also promised that he would be named chairman of his department. (Appendix O, p. 92a) According to the petitioner, these promotions did not come to pass because the position was given to someone else who received preferential treatment as a former Gannon student. Petitioner's contract at Gannon was not renewed for 1982-83. (Appendix O, pp. 92a-93a).

This time, petitioner "floated a resume all over the country . . . [to] at least three or four huncred" colleges and universities. (Appendix O, p. 93a) This effort did not result in a job offer from any American college or university. Petitioner was able to obtain a position, however, at Saurashtra University in India where he was employed as a full professor of economics and

director of the postgraduate program in business management from April 1983 through April 1984. (Appendix O, p. 93a)

2. Petitioner's employment by Rutgers.

The first step in hiring decisions by the Faculty of Business Studies (FBS) at Rutgers' Camden campus is a determination by faculty and administrative officers that a vacancy needs to be filled or a new position created. No hiring may occur unless a "line" – a commitment of funds – is made available to the academic unit, in this instance FBS. Members of the Appointments and Promotions Committee (the "A & P Committee") of FBS interview the candidates and make a recommendation to the Associate Dean of FBS, who also interviews the candidates. The Associate Dean then forwards his recommendation to the Dean of FBS. In the case of an appointment not involving tenure, such as the plaintiff's, the Dean or his designee negotiates the salary with the successful candidate within the salary parameters of the funds available for the position and the salary scale for the appropriate rank as established in the collectively negotiated agreement between the University and the AAUP. (Appendix M, p. 56a-57a)

In February 1984, well into the recruiting process for the coming academic year, petitioner wrote to Dr. Weissenberg seeking employment at Rutgers. (Appendix L, p. 48a) Dr. Weissenberg responded to the inquiry by letter dated March 6, 1984. This letter did not discuss possible salary, but Dr. Weissenberg did make clear that he could not offer petitioner the rank of Associate Professor with tenure. Instead, Dr. Weissenberg suggested the possibility of a position as visiting faculty member. (Appendix L, pp. 51a-52a)

Petitioner rasponded by expressing interest in such a position. Petitioner raised the issue of salary, stating:

> As for the salary amount, I have in mind a figure in the *low thirties* for the academic year. [emphasis added] [Appendix L, p. 53a]

Upon his return to the United States in May 1984, petitioner visited Rutgers' Camden Campus and was interviewed by two members of the A & P Committee (Appendix O, p. 94a), both of whom recommended petitioner's appointment as an Assistant Professor of Finance. Dr. Weissenberg was also in favor of hiring petitioner at the rank of assistant professor. (Appendix L, p. 48a)

The line available for this position was funded at $27,084. The allocation of funds to this line occurred early in the hiring process, long before petitioner applied for the position. Indeed, before petitioner applied, the position had already been offered (at the rank of assistant professor and at a salary no higher than $27,084) to other candidates who declined the offer. (Appendix L, p. 47a)

However, in recommending petitioner's appointment, Dr. Weissenberg requested additional funding of $3,093 so that petitioner's salary was to be $30,177. (Appendix L, pp. 48a-49a) Petitioner's salary was on the higher end of the assistant professor range which, in July 1984, went from $20,329 to $34;145. In fact, at the time of petitioner's hire there were six assistant professors in FBS and petitioner's salary was the highest of all those at that rank. (Appendix L, p. 49a; Appendix M, p. 59a)

On May 25, 1984, then-Dean Walter Gordon wrote to petitioner offering him a position as an Assistant Pro-

fessor[6] at a salary of $30,140. In mid-June 1984, petitioner signed and returned a faculty contract reflecting these terms and began his employment at Rutgers on July 1, 1984. (Appendix M, pp. 57a, 61a)

Significantly, at the time the offer of employment was made, petitioner believed that the University was improperly discriminating against him. Petitioner testified that he believed at the time that he was hired as "window dressing" so that the University would have a "colored face or minority for three or four years."

> Q. Did you discuss salary with him [Dr. Peter Weissenberg] at that point?
>
> A. Yes, we discussed salary and I said, Peter, what do you think is reasonable, and he said he could offer me 30. I said, Peter, you offered me 32 back in '81 and after that I was a full professor, I was a director. Now you are saying 30. He said take it or leave it. And I said the going rate is in the upper 40s and he said, Jay, take it or leave it. He – in all fairness to me, and although I like Peter, I think Peter and Milton Leontiades – Milton Leontiades is a full professor of management, although like me he's an economics Ph.D., and like me, he has been teaching management – they both had entered into a conspiracy.
>
> Q. What do you base that accusation on?

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[6] Academic rank at Rutgers is determined by the professional and scholarly credentials of the candidate including degree(s) received or to be received; institutions attended; nature and extent of scholarly publications and research activity; the quality and quantity of scholarly publications and other evidence of research activity; nature and extent of involvement in professional and academic organizations; professional promise; teaching experience; and visibility and impact within the field. (Appendix M, pp. 58a-59a)

A. I'm coming to that, Mr. Alterman. I'll tell you more about it. The plot was that I would be hired – Peter had told me a few things. I'll tell you in a minute. I would be hired and I would be let go and I would then be a colored face or a minority for three or four years. In the meantime, they would probably catch another minority man as a window dressing. This is the sort of a plot that I think he and Milton Leontiades were hatching.

Q. What do you base that belief on?

A. Okay. I base that belief on this: I told Peter, on the way when he took me back, that, Peter, I should like to buy a house, and what area would he recommend. Now, I didn't know anything about the geography of New Jersey, nor Philadelphia, really, and he said that there was no need for me to buy a house, nor for me to call my family, you know. He said that there was no big rush, and he was dissuading me from settling down, which confirmed my belief. I knew that he was offering me a salary which was ten, maybe $15 thousand below any person coming from a full professor's position would expect. [Appendix O, pp. 95a-96a]

Petitioner testified that he formed this belief at the time he was hired:

Q. Have you – did you at the time form a belief as to why he couldn't offer you more than $30 thousand per year?

A. My, my impression was that as Weissenberg saw it, I was going to be in the revolving door, so to speak, window dressing for two or three years, you know.

Q. Did you form this belief at the time?

A. Yes, I did. [Appendix O, p. 96a]

Petitioner also explained why he accepted the position at Rutgers notwithstanding his belief that he was being discriminated against at the time:

> You see, I was in a position where I had no job before I took the Rutgers' job. The hiring season was way behind me. There was no cash flow. I was surviving on my savings, and, knowing Peter, from what little I knew of him at that time; number one, he was a likable man; *number two, he was being blatantly discriminatory;* number three, hoping that there would be wiser men than him, and having an optimistic attitude toward life, I decided to go with Rutgers. [emphasis added] [Appendix O, p. 96a]

Upon his arrival at Rutgers, petitioner was assigned an office on the fifth floor of Victor Hall. The primary consideration in making this assignment was the availability of office space. (App. L, p. 49a)

At the time petitioner was assigned his office (July 1984), it was the only one available. In any event, his office was on the same floor and in the same vicinity as the only other person specializing in finance – petitioner's field. At that time 13 FBS faculty had offices on the sixth floor of Victor Hall and seven had offices on the fifth floor. Three FBS faculty were located in Armitage Hall, another building on campus. (Appendix L, p. 49a)

3. The EEOC Charges.

On November 14, 1985, some seventeen (17) months after his initial placement on the salary guide, his assignment of rank and office assignment, petitioner filed with the EEOC a charge of discrimination against the University. In that chage, petitioner complained that he

received an inappropriate salary in July 1984 as a result of illegal discrimination by the University. Significantly, petitioner asserted that:

> In *December 1984*, I discovered I am being paid less than the average *Associate* Professor [emphasis added]

(Appendix Y, pp. 126a-127a)

Petitioner filed subsequent charges of discrimination with the EEOC on May 8, 1986 and March 18, 1987. (Appendix Y, pp. 128a-132a) These charges assert, in essence, that the University harassed petitioner in retaliation for his filing charges with the EEOC.

All three of petitioner's charges were investigated by the EEOC which found no evidence of any violation of Title VII and dismissed the charges. (Appendix Y, pp. 133a-153a)

SUMMARY OF ARGUMENT

The District Court applied well-settled law in holding that petitioner's claims were barred by the applicable statutes and limitations. Petitioner has not pointed to any decisions of this Court or of other Courts of Appeals in conflict with the decision in this case.

The discriminatory acts of which petitioner complains all took place in May, June, and July 1984. The complaint was filed well after expiration of the two year statute governing claims in New Jersey under 42 U.S.C. §§1981, 1983, and 1985 and the one year statute governing claims under 42 U.S.C. §1986. Similarly, petitioner's EEOC charge – filed on November 17, 1985 – was well beyond either the 180 or 300 day Title VII charge filing period period established by 42 U.S.C. §2000e-5(e).

Petitioner's arguments regarding unlawful and fraudulent conduct on the part of the Court of Appeals and the District Court are plainly without merit. Both the Court of Appeals and the District Court acted well within the bounds of their discretion with respect to discovery and other procedural matters. Petitioner's conclusory and far-fetched assertions are insufficient to establish an abuse of discretion by either the Court of Appeals or the District Court, much less a departure so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

ARGUMENT

I.

THE DISTRICT COURT DECISION AND ITS AFFIRMANCE BY THE COURT OF APPEALS DO NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS OR WITH ANY DECISIONS OF THIS COURT. NOR DOES THIS CASE PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT.

The critical factor in assessing the timeliness of any claim is the determination of when the limitations period begins to run. This is done by identifying the discriminatory acts of which petitioner is complaining. *See, Chardon v. Fernandez,* 454 U.S. 9 (1981); *Delaware State College v. Ricks,* 449 U.S. 250 (1978).

Here, the allegedly discriminatory acts of which the petitioner complains occurred in May, June and July of 1984. As the District Court noted, at his deposition, petitioner expressly stated that he believed, *even at the time he was hired,* that Rutgers was discriminating against him but that he accepted the position because

he thought that he could convice others at the University to remedy this discrimination. (Appendix M, p. 00a)

Having identified when the statutes of limitations began to run – July 1984 at the latest – the District Court also had to determine the length of the applicable limitations periods. Pursuant to 42 U.S.C. §1988, the District Court applied New Jersey's two year statute of limitations for personal injuries (N.J.S.A. 2A:14-2) to petitioner's claims under 42 U.S.C. §§1981, 1983, and 1985, consistent with this Court's decisions in *Owens v. Okure,* 488 U.S. 235 (1989) and *Goodman v. Lukens Steel,* 482 U.S. 656 (1987) and the Third Circuit Court of Appeals' decision in *Cito v. Bridgewater Twp. Police Dept.,* 892 F.2d 23 (3d Cir. 1989).

With respect to claims under 42 U.S.C. §1986, the statute itself provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

And, under Title VII, as a statutory prerequisite to maintaining an action, a charge must be filed with the EEOC within 180 days of the occurrence of the allegedly unlawful act. 42 U.S.C. §2000e-5(e). *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982).

Since petitioner's causes of action accrued and the limitations period began to run, at the latest, in July 1984, petitioner was required to file suit under §1986 no later than July 1985 and under §§1981, 1983 and 1985 no later than July 1986 and was required to file his EEOC charge under Title VII no later than December 1984. He did not do so. Accordingly, the District Court correctly held that his Title VII charge filed on November 11, 1985 and his complaint setting forth claims under

42 U.S.C. §§1981, 1983 1985 and 1986 and filed on September 21, 1988 were both untimely.

Petitioner does not appear to argue that the District Court's decision and the Court of Appeals affirmance of it conflict with decisions of other courts of appeals or of this Court. Nor does petitioner contend that this case presents an important question of federal law that has not been, but should be, decided by this Court. In any event, it is plain that the District Court decision granting summary judgment to the University was fully consistent with this Court's relevant precedents. Issuing a writ of certiorari will not provide an opportunity for this Court to resolve any conflicts among the circuits or to resolve any important but unsettled questions of federal law.

II.

PETITIONER'S ASSERTIONS THAT THE COURT OF APPEALS AND THE DISTRICT COURT ACTED UNLAWFULLY AND FRAUDULENTLY IN DISCOVERY AND OTHER PROCEDURAL MATTERS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION UNDER SUPREME COURT RULE 10.1(a) ARE CONCLUSORY AND FRIVOLOUS.

Notwithstanding petitioner's continual filing of various motions, petitions, and applications – many of which contained bizarre allegations and many of which were frivolous – the record reflects that the District Court and the Court of Appeals at all times dealt with plaintiff's filings on their merits and in a straightforward manner. While the Petition contains conclusory allegations of unlawful and fraudulent conduct on the part of the courts below, the record discloses no conduct that would call for the Court to issue a writ of certiorari in exercise of its supervisory powers.

The focus of petitioner's argument in this respect seems to be on the District Court's handling of various discovery matters, with particular emphasis on the District Court's denial of petitioner's application for additional opportunity for discovery prior to the issuance of a ruling on the University's summary judgment motion. (Petition at 33 to 38 and 43 to 46) The District Court found that petitioner's motions regarding discovery, even if granted, would not have any effect on the court's statute of limitations rulings which were dispositive. Control of discovery, of course, is committed to the sound discretion of the district courts and their rulings on discovery (and other procedural) matters will not be disturbed absent a showing of abuse of discretion.

Undoubtedly, district courts are faced daily with summary judgment motions while discovery is ongoing or motions to compel or for more complete discovery are pending. Sometimes the courts hold the summary judgment motion in abeyance while discovery continues; other times, being satisfied that the discovery issues will not affect disposition of the summary judgment motion, the courts end discovery and rule on the motion. By doing so here, the District Court cannot be said to have "so far departed from the accepted and usual course of judicial proceedings" as to require this Court to step in and exercise its supervisory powers.

The cases cited by petitioner in support of his argument for the Court to exercise its supervisory powers are of no help to him. (Petition at 49 to 50)

In *Will v. United States,* 389 U.S. 90 (1967), the Court granted certiorari where the Court of Appeals issued a writ of mandamus and its action had wide implications for the orderly administration of criminal justice in the federal courts. 389 U.S. at 95. No such

concerns are present here; nor does this case involve the issuance of a writ of mandamus by the Court of Appeals. Similarly, the Court granted review in *McNabb v. United States,* 318 U.S. 332 (1943), also cited by petitioner, because the petition for certiorari presented serious questions regarding the administration of criminal justice in the federal courts. 318 U.S. at 333.

In *Will v. Calvert Fire Insurance Company,* 437 U.S. 655 (1978), the Court granted certiorari to review a writ of mandamus issued by the Court of Appeals. The issue was whether the writ impermissibly interfered with a matter committed to the sound discretion of the District Court and was therefore improperly granted. Again, no such considerations are involved in this case. On the contrary, the law is clear that the rulings on petitioner's discovery motions and motion for a continuance were committed to the District Court's discretion and that they should not be disturbed absent an abuse of discretion – a showing which petitioner has not made and cannot make.

In *DeBeers Consolidated Mines v. United States,* 325 U.S. 212 (1945), the Court granted certiorari to review a preliminary injunction issued by the District Court where there was a question as to whether the injunction was beyond the jurisdiction of the District Court. No such considerations pertain in this case.

Hanna v. Plumer, 380 U.S. 460 (1965) bears no relation to this case. There, the Court granted review to decide an important question regarding the applicability of state or federal law to service of process in diversity cases. It did not involve the Court's exercise of its supervisory powers to correct a departure by the courts below from the accepted and usual course of judicial

proceedings; rather it raised important issues regarding the uniformity of procedure in the federal courts. 380 U.S. at 462-63.

In both *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) and *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) the Court granted certiorari to review important but unsettled questions of federal civil procedure. 379 U.S. at 109; 352 U.S. at 251. In neither of these cases did the Court predicate its grant of certiorari on the lower courts departing so far from the accepted and usual course of judicial proceedings as to require the Court to exercise its supervisory power. Thus, they are of no help to petitioner.

In short, petitioner has not shown that either the District Court or the Court of Appeals has acted palpably beyond its jurisdiction. The record discloses no aspect of the District Court's or the Court of Appeals' handling of this case to have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision." On the contrary, the discovery rulings on which petitioner focuses were well within the District Court's discretion. Accordingly, there is no reason for this Court to grant certiorari since this case does not otherwise satisfy any of the other criteria for review on certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 9, 1992